91-880

(1)

No. _____

In The

Supreme Court of the United States

October Term, 1991

RONALD JOSEPH PUMA,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER THE DISTRICT COURT IMPROPERLY IMPOSED A GROSSLY DISPARATE AND DISPROPORTIONATE SENTENCE UPON PETITIONER RELATIVE TO OTHER PARTIES WHEN EACH PARTY WAS A SIMILAR OFFENDER ENGAGED IN SIMILAR CRIMINAL CONDUCT, IN VIOLATION OF DUE PROCESS AND THE FEDERAL SENTENCING GUIDELINES.

2. WHETHER THE DISTRICT COURT FAILED TO MAKE SPECIFIC FACTUAL FINDINGS REGARDING THE ACCURACY OF INFORMATION CONTAINED IN THE PRESENTENCE REPORT IN VIEW OF THE PETITIONER'S CHALLENGES TO ITS FACTUAL INACCURACIES, IN VIOLATION OF THE FIFTH AMENDMENT GUARANTEE OF DUE PROCESS OF LAW AND FED.R.CRIM.P. 32(c)(3)(D).

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OPINIONS BELOW

A jury convicted Petitioner in the Northern District of Texas. The Court of Appeals for the Fifth Circuit affirmed the conviction on July 22, 1991. See Appendix A. Petitioner's timely motion for rehearing was denied on August 29, 1991. See Appendix B.

JURISDICTION

The District Court had jurisdiction under 18 U.S.C. §3231. The United States Court of Appeals for the Fifth Circuit had Appellate Jurisdiction under 29 U.S.C., §1291. This Court has jurisdiction under 28 U.S.C., §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"Amendment V"

"No person shall . . . be deprived of life, liberty, or property, without due process of law. . . . "

Title 28 U.S.C. §991(b)

The purposes of the United States Sentencing Commission are to –

(1) establish sentencing policies and practice for the Federal Criminal Justice System that –

* * *

(b) provide certainty and fairness in meeting the purposes of sentencing, avoid unwarranted

sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; . . . . "

18 U.S.C. §3553

"(a) factors to be considered in imposing a sentence. The Court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The Court, in determining the particular sentence to be imposed, shall consider –

* * *

(6) the need to avoid unwarranted sentence disparities among Defendants with similar records who have been found guilty of similar conduct; . . . "

STATEMENT OF THE CASE

Petitioner and two co-defendants were convicted of various offenses stemming from an alleged large scale conspiracy to produce, transport, and sell amphetamines in violation of Titles 18 and 21 of the United States Code. The District Court set sentence on Count 2 at imprisonment for 360 months and set sentences on the remaining 13 Counts at 20 years confinement, to run concurrently; and a 3 year supervised release and a fine.

During the sentencing hearing, the District Court considered the written objections and verbal objections lodged by Petitioner to the pre-sentence investigation report. Specifically, the pre-sentence report stated that a federal investigation began in April, 1986; that the investigation "determined that Mr. Payne and (Petitioner) were the main figures in a large scale criminal enterprise which manufactured and distributed amphetamine" in Texas, Louisiana, Oklahoma and Arkansas; and that "this organization was operated through a single 'pyramid' type structure with Messrs. Payne, (Petitioner), and (co-defendant) Dodd spotlighted as the top level single 'executives' and the most culpable of the defendants. (Paragraphs five and six of the pre-sentence report)

Relevant to this Petition are the following objections lodged by Petitioner in writing prior to the sentencing hearing:

> "1. Defendant objects to paragraph five, wherein it implies that the Defendant has been involved in a 'large scale criminal enterprise' since April, 1986, and that he had been a 'main figure' throughout this period.
>
> 2. Defendant objects to paragraph six, wherein it suggests that the Defendant was a so-called 'top level executive' for the whole period beginning in April, 1986. Defendant specifically objects to the statement therein which says, 'these three individuals also were fully cognizant of the extent and nature of the conspiracy.', as a conclusion which far exceeds any relevant evidence presented at trial and is contradicted by the officer's statement in paragraph four of the report. This further is an improper and

> incorrect application of the sentencing guidelines and criteria". (Paragraphs 1 and 2 of Objections to Presentence Report)

Petitioner's objections to the pre-sentence report likewise brought to the attention of the Court that a reduction of sentence under §3E1.1 of the guidelines was mandated and the Petitioner's "exercise of his constitutional right to trial should not be used to penalize him in a manner in conflict with the sentencing guidelines and due process of law". Petitioner further objected to the offense level computations in paragraphs 20 and 21 as being improper and incorrect; and further objected that the probation officer failed to adequately consider his family background and lack of any criminal history. (Paragraphs 9, 11, and 15 of the Objections to Presentence Report)

On direct appeal, Petitioner continued to argue that the sentence imposed in this case was disproportionate and a violation of due process and that the District Court failed to comply with Fed.R.Crim.P. 32(c)(3)(D).

At the sentencing hearing, when these matters were brought to the attention of the District Court, the Court stated in part:

> "THE COURT: I will find that he has been a main figure in a large scale enterprise and that he was one of the three persons who were top level executives in that enterprise.
>
> You have a number of other objections which I just simply overrule. The Government response outlines the evidence in connection

with these matters, and I will find that the Government's response correctly does state the evidence in that instance. I have gone over it very carefully. I took these home over the weekend and reviewed them point by point." (Sentencing Record at 5)

Petitioner likewise challenged the disparate sentencing process in relationship to the other parties involved in this case who were charged with similar crimes in the same conspiracy, as their sentences were significantly lower and as they were eligible for parole after serving a small portion of their respective sentences whereas Petitioner would have to serve almost all of his sentence under the new Federal Sentencing Guidelines (Sentencing Record at 3, 4).

The Court ruled as follows:

"Of course, you are quite correct in saying the sentences are disproportionate in view of the fact that certain persons that are very much involved in the litigation pled guilty to lesser counts, and received lesser sentences. I believe, if I'm not mistaken, Mr. Payne was sentenced to 20 years. but I think he should be at least – he can't be paroled in less than a third of that, but after that time he would be eligible for parole under the – pursuant to the Parole Commission decision. That is simply a function of operation of the guidelines and I think the Court is bound by the act of Congress and its decision concerning the guidelines and this is clearly a guideline case.

To the extent you are making an argument somehow because other Defendants have pled guilty to counts that were not guideline counts

that the Court can disregard the guidelines. I will just simply overrule that proposition, counsel. I don't think I can do that. (Sentencing Record at 5, 6)

SUMMARY OF ARGUMENT

Certiorari should be granted in this case to settle a conflict among the Courts of Appeals on the two issues presented.

First, the sentence of 30 years imposed in this cause is a grossly disparate and disproportionate sentence relative to all other parties and it is recognized that each party was a similar offender engaged in similar criminal conduct, particularly as to Petitioner, Payne and Dodd. Payne, particularly, received a 20 year sentence, not only a 10 year difference between his and Petitioner's sentence but also a substantially lower sentence when parole is considered. The sentence imposed violates the intent of the sentencing guidelines to avoid unwarranted sentencing disparities among similarly situated Defendants. The disparity is accentuated by the fact that Payne was, without a doubt, the head of the entire criminal organization over the entire period of the conspiracy. Compared to Payne, Petitioner bore far less culpability as to conduct and period of time involved and responsibilities.

Second, the District Court, when faced with Petitioner's objections as to factual inaccuracies in the pre-sentence investigation report, failed to make any

specific factual findings, in violation of Fed.R.Crim.P. 32(c)(3)(D).

REASONS FOR GRANTING THE PETITION

1. THE DISTRICT COURT IMPROPERLY IMPOSED A GROSSLY DISPARATE AND DISPROPORTIONATE SENTENCE UPON PETITIONER RELATIVE TO OTHER PARTIES WHEN EACH PARTY WAS A SIMILAR OFFENDER ENGAGED IN SIMILAR CRIMINAL CONDUCT, IN VIOLATION OF DUE PROCESS AND THE FEDERAL SENTENCING GUIDELINES.

Petitioner, while recognizing adverse authorities, submits that the Court of Appeals decided an important question of federal law in this case which has not yet been settled by this Court and which is in conflict with the decision of another United States Court of Appeals decision on the same matter.

At the outset it should be recognized that Petitioner had no prior criminal history whatsoever. While Petitioner has always contested his guilt in this case, assuming the Government's evidence to be true. Petitioner has no more than the same or less culpability than the Government's prime witness, Payne, who was, without question, the number one figure and ring leader in the entire narcotic operation.

While the operation may have began in 1986, the Government evidence linked Petitioner no sooner than 1988. Petitioner exercised his constitutional right to plead not guilty before a jury and contest his involvement in

any criminal activity. On the other hand, Payne and others negotiated plea agreements and received substantially less prison sentences on fewer counts.

Sentencing discretion must be exercised within the boundaries of due process. *Gardner v. Florida*, 430 U.S. 349 (1977).

28 U.S.C. §991 (b)(1)(B) emphasizes that one of the main purposes of the United States Sentencing Commission is to establish sentencing policies and practices for the Federal Criminal Justice System that provide "certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . . ".

18 U.S.C. §3553 specifies that factors to be considered in imposing sentence include "the need to avoid unwarranted sentence disparities among defendants with similar records who have been guilty of similar conduct".

An often cited rule is that the "mere disparity of sentences among co-defendants does not, alone, constitute an abuse of discretion." *United States v. Boyd*, 885 F.2d 246 (5th Cir. 1989).

It has, however, been an unquestionable principal congressional goal for both the Sentencing Commission and the sentencing judge to eliminate unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct. 28 U.S.C. §991(b)(1)(B); 18 U.S.C. §3553(a)(6). It is the intent of the sentencing guidelines to avoid unwarranted sentencing disparities among similarly situated

defendants. *United States v. Keene*, 915 F.2d 1164 (8th Cir. 1990).

The Court in *United States v. Sardin*, 921 F.2d 1064 (10th Cir. 1990) emphasized that the sentencing guidelines incorporated principles of equality and proportionally; their purpose was to narrow the disparity in sentences imposed for similar criminal conduct by similar offenders.

When a judge imposes disparate sentences on similar defendants without explanation, at least an inference of impropriety arises. *United States v. Beverly*, 913 F.2d 337 (7th Cir. 1990); *United States v. Neynes*, 831 F.2d 156 (7th Cir. 1987). In the face of similar challenges, courts have analyzed the particular circumstances and noted that one party had a more extensive criminal history, a different background, a substantially different culpability, or a more aggravated role in the crime. *United States v. Meggers*, 912 F.2d 246 (8th Cir. 1990); *United States v. Scherl*, 923 F.2d 64 (7th Cir. 1991); *United States vs. Schular*, 907 F.2d 294 (2nd Cir. 1990); See and compare *United States v. Nelson*, 918 F.2d 1268 (6th Cir. 1990). It is also important to note that even the District Court recognized that the sentence imposed upon the Petitioner was disproportionate when compared to all the other parties in the case (Sentencing Transcript at 5)

In this case, it is clear that 10 calender years separated the sentences imposed upon Petitioner, (30 years) and Payne (20 years). Payne was, without a doubt, the principal figure in the entire narcotic enterprise and the most culpable of any other player in the organization. Yet, Payne received a 20 year sentence, the others

received substantially less and Petitioner was left to serve almost 30 calender years.

Petitioner submits that under the facts and circumstances of this case, the 30 year sentence imposed was grossly disparate and disproportionate as the Defendants were similarly situated for identical offenses, with no explanation being given for the sentence imposed, all in violation of Petitioner's fundamental right to due process of law under the Fifth Amendment to the United States Constitution.

2. THE DISTRICT COURT FAILED TO MAKE SPECIFIC FACTUAL FINDINGS REGARDING THE ACCURACY OF INFORMATION CONTAINED IN THE PRE-SENTENCE REPORT IN VIEW OF THE PETITIONER'S CHALLENGES TO ITS FACTUAL INACCURACIES, IN VIOLATION OF THE FIFTH AMENDMENT GUARANTEE OF DUE PROCESS OF LAW AND FED.R.CRIM.P. 32(c)(3)(D).

Petitioner submits that the decision of the United States Court of Appeals in this case is in conflict with decisions of other United States Courts of Appeals on the same matter.

The record reflects that Petitioner brought to the attention of the District Court the written objections to the pre-sentence report. The Court overruled the objections and found that Petitioner was a main figure in a large scale enterprise and was one of three persons who were top level executives in the enterprise. The Court overruled all other objections (Sentencing Transcript at 5).

The thrust of Petitioner's objections to the two paragraphs at issue in the report was that even the Government's evidence did not demonstrate Petitioner was part of the narcotic operation since April 1986, or was a main figure throughout the entire period or a top level executive for the entire period. The report, therefore, greatly exaggerated the role of Petitioner and enhanced his criminal culpability beyond the trial evidence. Petitioner specifically objected on these grounds yet the District Court failed to revolve the matter.

It is settled that a sentence imposed which is bottomed on improper or unreliable information constitutes a violation of due process. *United States v. Dougherty,* 895 F.2d 399 (7th Cir. 1990). The Fifth Amendment guarantee of due process protects every accused from consideration of improper or inaccurate information. *United States v. Tucker,* 404 U.S. 443 (1972). Reliance upon information which is either not true or so lacking in this indicia of reliability as to be of little value violates due process and requires remand for resentencing. *United States v. Conforte,* 624 F.2d 869 (9th Cir. 1980); *United States v. Safirstein,* 827 F.2d 1380 (9th Cir. 1987).

Fed.R.Crim.P. 32(c)(3)(D) requires that, when a defendant challenges information contained in the pre-sentence report, the trial court must either (1) make a factual finding regarding the accuracy of the information, or (2) expressly state that it is not relying on the disputed information.

Courts reviewing similar challenges have insisted on literal compliance with this rule, if for no other reason than because the report in question is a document that

will follow the defendant throughout the term of his sentence and will be relied upon heavily by prison authorities in making critical determinations relating to custody and/or parole. *United States v. Geer,* 923 F.2d 892 (1st Cir. 1991). In *Geer,* supra, the Court found that the District court did not append the requisite written record of its findings or determinations about the contested matters in the pre-sentence report. Strict compliance with this rule is required and failure to comply will result in remand. *United States v. Clay,* 925 F.2d 299 (9th Cir. 1991); *United States v. Fernandez-Angulo,* 863 F.2d 1149 (9th Cir. 1988).

In reviewing similar claims, cases have been remanded where literal compliance with the rule was not achieved or where the record was unclear as to whether the Judge relied on disputed information in the report. *United States v. Levy,* 897 F.2d 596 (1st Cir. 1990); *United States v. Jimenez-Rivera,* 842 F.2d 545 (1st Cir. 1988).

As emphasized in *United States v. Gutierrez,* 931 F.2d 1482 (11th Cir. 1991), in order to facilitate judicial review of sentencing decisions and avoid unnecessary remands, each sentencing court should make explicit findings of fact and conclusions of law.

In this case, Petitioner objected to the pre-sentence investigation report by alleging factual inaccuracies, which required the District Court to make a finding as to each allegation or a determination that no such finding was necessary because it would not be taken into consideration in sentencing. The District Court failed to make

such a finding as to the allegations of factual inaccuracies in this case.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted:

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-1420

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RONALD JOSEPH PUMA, a/k/a
RONNY PUMA, DONNIE K. NICHOLS,
a/k/a DEAD WEIGHT and DW, and
ERNEST RAYMOND DODD, a/k/a RD,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas

(July 22, 1991)

Before Reynaldo G. GARZA, HIGGINBOTHAM, and DAVIS, Circuit Judges.

HIGGINBOTHAM, Circuit Judge:

Ronald Puma, Donnie Nichols, and Ernest Dodd appeal their convictions following a jury trial for conspiracy to produce, transport, and sell amphetamines in violation of federal narcotics statutes. They urge insufficiency of evidence to support their convictions, incorrect application of the sentencing guidelines, defective indictment, and errors in the admission of evidence.

We reject all defendants' contentions except that we find that the trial court did not expressly find that Nichols could have reasonably foreseen that the conspiracy of which he was convicted would involve 390 pounds of amphetamine. We vacate Nichols' sentence and remand to the trial court for any additional findings and resentencing.

I.

Robert Payne was originally indicted with the appellants but testified pursuant to a plea agreement. Payne testified that Ernest Dodd sold amphetamine powder to him in 1985 for Payne's personal use, followed in 1985 and 1986 by larger quantities of amphetamine powder which Payne in turn sold for a profit. According to Payne, this relationship continued until February of 1988.

Payne testified that by 1988 Dodd was unable to meet his need so he decided to acquire a new source of amphetamine. In the meanwhile Payne learned to convert amphetamine oil to powdered amphetamine by observing the conversion process at Dodd's wrecker service in Fort Worth.

Payne testified that he met Ronald Puma in 1988. According to Payne, Puma had supplied Dodd with amphetamine oil, but Dodd had fallen into debt with Puma. Payne testified that he and Puma reached an agreement in 1988 under which Puma would sell amphetamine oil to Payne who would convert the oil into powder and sell it to others. Payne also sold chemicals necessary for amphetamine production to Puma. According to Payne, Puma and Payne discussed both these sales

of amphetamine powder and Puma's own production process. For example, Payne testified that in December, 1988, he and Puma discussed replacing laboratory equipment destroyed in a chemical explosion. The relationship between Puma and Payne ended when agents from the Drug Enforcement Agency searched Payne's house in July of 1989.

The government tied Donnie Nichols to the conspiracy through his relationship with Oda Lee Ratheal, a steady customer of Payne's and an indicted co-conspirator who testified in this case pursuant to an agreement with the prosecution. Ratheal met Nichols in 1984. In March, 1986, Ratheal began to purchase amphetamine powder from Payne. Ratheal testified that he sold amphetamine powder to Nichols almost every time that Ratheal purchased it from Payne. According to Ratheal, Ratheal informed Nichols that Payne was Ratheal's supplier. Ratheal's wife, Dodie, testified that Nichols assisted her husband in weighing, cutting, and bagging amphetamine and that Nichols had informed her that he sold amphetamine to others. In Oda Lee Ratheal's opinion, Nichols could not use all the amphetamine that Nichols purchased from Ratheal.

In 1986, Oda Lee Ratheal was injured in an automobile accident. Ratheal testified that Nichols assisted his wife Dodie in purchasing and weighing amphetamines while Oda Lee Ratheal was hospitalized, accompanying Dodie Ratheal on her trips to a truck stop where they picked up their supply of amphetamine. After Ratheal's recovery, Nichols accompanied Ratheal when Ratheal travelled to Payne's home to purchase amphetamine.

Ratheal also purchased amphetamine with Nichols' money.

On September 22, 1989, appellants, along with nineteen others, including Payne and the Ratheals, were charged in a 76-count indictment with the violation of federal drug statutes, money laundering offenses, and violations of the Travel Act. The indictment also charged that Puma had used profits from a continuing criminal enterprise to purchase certain property which in turn had been used to facilitate the continuing criminal enterprise.

Dodd was convicted for conspiracy to produce and distribute amphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846 and given a twenty-year sentence. Nichols was similarly convicted and sentenced to serve 151 months. Puma was sentenced to 360 months upon his conviction for conspiracy to violate 21 U.S.C. §§ 841(a)(1), 846, 848 and 853, and 18 U.S.C. §§ 1952(a)(3), 1856(a)(1)(8)(i), and 2. He also forfeited the Diamond Oaks Motor Company and $5,030.00 which were found by a jury's special verdict to have been obtained through the profits of a continuing criminal enterprise, pursuant to 21 U.S.C. § 853(a)(1)(3).

II.

Puma raises eight points of error. All are without merit.

A. Constitutionality of Sentencing Guideline 3E1.1; Sufficiency of Evidence; Defective Indictment

Puma first contends that Sentencing Guideline 3E1.1 violates his Sixth Amendment right to a jury trial. An

identical contention was considered and rejected in United States v. White *et al.*, 869 F.2d 822, 826 (5th Cir.), *cert. denied*, 490 U.S. 1112 (1989). Puma next argues that there was not sufficient evidence to support his convictions because certain witnesses were given an incentive to testify against him by plea agreements. Such plea agreements raise issues of credibility. Credibility was for the jury. *United States v. Martin*, 790 F.2d 1215, 1219, *cert. denied*, 479 U.S. 868 (1986).

Puma finally urges that his indictment was fatally defective in not alleging the quantities of amphetamine it charged him with possessing. This argument is made for the first time in this appeal. We therefore review only to ascertain whether the indictment stated the essential elements of the charged offenses. *United States v. Wilson*, 884 F.2d 174, 179 (5th Cir. 1989); *United States v. Campos-Asencio*, 822 F.2d 506, 508 (5th Cir. 1987). Quantity is not an element of any of the charged offenses. *United States v. Medina*, 887 F.2d 528, 532 (5th Cir. 1989) (stating elements of violation of 18 U.S.C. § 2); *United States v. Hanandez-Palacios*, 838 F.2d 1346, 1350 (5th Cir. 1988) (stating elements of violation of 18 U.S.C. § 1952); *United States v. Morgan*, 835 F.2d 79, 81 (5th Cir. 1987) (stating elements of violation of 21 U.S.C. § 841(b)(1)(A)); *United States v. Sperling*, 506 F.2d 1323, 1344 (2d Cir. 1974) (stating elements of 21 U.S.C. § 848), *cert. denied sub nom Goldstein v. United States*, 420 U.S. 962 (1975). The indictment, therefore, contained the essential elements of the offenses charged and is sufficient.

B. Puma's Objections to his Sentence

Puma raises five objections to his sentence. First, he urges that the trial court violated Fed. R. Crim. P. 32 (c)(3)(D). Second, Puma claims that it was based on inaccurate information. Third, Puma argues that the disparity between his sentence and the sentence of his co-conspirators, especially Payne's sentence violates the "spirit" of the sentencing guidelines. Fourth, Puma argues that the trial court ordered forfeiture in violation of Fed. R. Crim. 7(c)(e) and 31(e). Finally, Puma alleges that there is insufficient evidence to support forfeiture of certain automobiles.

1. Fed. R. Crim. P. Rule 32 (c)(3)(D)

Fed. R. Crim. P. Rule 32(c)(3)(D) provides that:

> If the comments of the defendant and the defendant's counsel or testimony or other information introduced by them allege any factual inaccuracy in the pre-sentence report or the summary of the report of part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the pre-sentence report thereafter made available to the Bureau of Prisons.

Puma contends that the trial court's failure to make written findings rejecting Puma's challenges to the pre-sentence report, is reversible error. This contention is

meritless. The trial court's express rejection of Puma's challenges to the pre-sentence report appears in the record. This oral finding satisfies 35(c)(3)(D)'s requirement that the trial court "make a finding as to the allegation" raised by Puma. *United States v. Burch*, 873 F.2d 765, 768 (5th Cir. 1989); *United States v. Lawal*, 810 F.2d 491, 493 n.2 (5th Cir. 1987). Puma's only objection must be that this ruling was not attached in writing to the pre-sentence report that was sent to the Bureau of Prisons. If so, the record does not show any prejudice for any such omission.

2. Accuracy of Information on which Sentence was Based

Puma's second contention, that his sentence was based on inaccurate information, is similarly meritless. The trial court expressly considered and rejected Puma's objections to the pre-sentence report. Puma alleges only one specific example of reliance on erroneous facts. He argues that the trial court should not have relied on the presentence report because the report refers to acts committed before the charged conduct. A sentencing court, however, may consider for sentencing purposes facts that were not alleged in the indictment. *United States v. Sarasti*, 869 F.2d 805, 806 (1989). The trial court in this case was well within its discretion in making the factual findings challenged by Puma.

3. Disparity in Sentences Received by Different Defendants

Puma's third objection to his sentence, raised by Nichols and Dodd as well, is that the disparity between

his sentence and the sentence of his co-conspirator Payne, rendered his sentence defective under the "spirit" of the Sentencing Guidelines. Puma's, Dodd's, and Nichols' own sentences fall within the range recommended by the Sentencing Guidelines. The fact that another party received a lower sentence than Puma does not alone make Puma's otherwise legal sentence a violation of the Sentencing Guidelines. *United States v. Pierce*, 893 F.2d 669, 678 (5th Cir. 1990).

4. Propriety of Forfeiture

Finally, Puma raises three objections to the forfeiture of property ordered by the trial court. First, he argues that the indictment failed to advise him of the precise extent of the forfeiture sought by the government, in violation of both Fed. R. Crim. P. 7(c)(2) and Fed. R. Crim. P. 31(e). Second, he argues that the jury's special verdict regarding the "Diamond Oaks Motor Company" inadequately specified the property that had been forfeited, in violation of Fed. R. Crim. P. 31(e). Third, Puma objects that there was insufficient evidence to support the forfeiture of certain automobiles listed in the amended order of forfeiture granted to the government by the trial court.

a. Sufficiency of Indictment under Rule 31(e) and 7(c)(2)

Puma did not raise with the district court his present objection to the indictment's specification of property subject to forfeiture. We therefore ask only whether the indictment states the essential elements of an offense.

Fed. R. crim. P. 12(b)(2). As we noted in *United States v. Cauble*, 706 F.2d 1322, 1347 (5th Cir. 1983) (en banc), *cert. denied*, 465 U.S. 1005 (1984), "[t]he purpose of the notice of forfeiture in the indictment is to inform the defendant that the government seeks forfeiture as a remedy." The designation of property subject to forfeiture is sufficiently specific if it "puts the defendant on notice that the government seeks forfeiture and identifies the assets with sufficient specificity to permit the defendant to marshal evidence in their defense." *Id.*

In this case, count 2 of the indictment states that the government sought forfeiture of the "Diamond Oaks Motor Company, 4249 Denton Highway, Haltom City, Texas" and "$5,030.00 in U.S. currency." This description of Puma's car lot business is amply sufficient to notify Puma that the government sought forfeiture of all of the company's assets. *Cauble*, 706 F.2d at 1347; *United States v. Boffa*, 688 F.2d 919, 939 (3d Cir. 1981) ("by alleging that all of the appellants' interest in the enumerated corporations was subject to forfeiture, the indictment alleged the 'extent of the interest or property subject to forfeiture' " required by Rule 7(c)(2)), *cert. denied*, 460 U.S. 1022 (1983). Moreover, count 3 of the indictment alleges precisely how the government intended to link the Diamond Oaks Motor Company both to money-laundering and to the proceeds of unlawful activity.

The indictment as a whole described the property and how it was illegally used. This was more than sufficient to allow Puma to marshall any defense. *United States v. Peacock*, 654 F.2d 339, 351 (5th Cir.) (specificity of forfeited property's description in indictment should be judged from indictment as whole), *modified*, 686 F.2d 356

(5th Cir.) (per curiam), *cert. denied*, 459 U.S. 870 (1982). It therefore violated neither Fed. R. Crim. P. 7(c)(2) nor Fed. R. Crim. P. 31(e).

b. Sufficiency of Special Verdict of Forfeiture Under Rule 31(e)

We also reject Puma's challenge to the jury's special verdict. The jury found that the "Diamond Oaks Motor Company" had been used to control, and had been purchased by the proceeds of, a continuing criminal conspiracy. This finding identifies with sufficient specificity the asset subject to forfeiture. The jury is under no obligation "to select only certain of that entities' assets for forfeiture. . . . " *Cauble*, 706 F.2d at 1349. *See also United States v. Tunnell*, 667 F.2d 1182, 1188 (5th Cir. 1982) (jury's special verdict need not identify which rooms of hotel were used in criminal enterprise for whole hotel to be forfeited). If *any* part of the motor company was purchased by, or used to control, the proceeds of a continuing criminal conspiracy, then it is "readily apparent that the entire property was subject to forfeiture" *United States v. Possick*, 849 F.2d 332, 341 (8th Cir. 1988). The jury's special verdict, therefore, complied with Fed. R. Crim. P. 31(e)'s requirement that the verdict identify "the extent of the interest or property subject to forfeiture."

c. Sufficiency of Evidence for Forfeiture of Property Listed in Order of Forfeiture

Puma's last contention is that there was insufficient evidence to support the order of forfeiture of numerous

automobiles and equipment. Puma argues that there was evidence that "the vehicles were legitimately and legally bought" without involvement of the proceeds of a criminal enterprise; they should not be forfeited because they do "not fall[] within the special verdict forfeiting 'Diamond Oaks Motor Company'."

There was ample evidence presented to the jury that the Diamond Oaks Motor Company was both derived from the proceeds of a criminal enterprise and afforded Puma control over a criminal enterprise. This evidence included physical evidence and testimony that the business was used to store amphetamine; testimony that the business was intended by Puma to be a front for amphetamine trafficking; and evidence that Puma's legitimate income was not large enough to cover the cost of purchasing the business.

Puma seems to be arguing that individual items belonging to the company were not involved in a criminal enterprise and that, therefore, those assets should not be forfeited. This is not the law. If the motor company was forfeitable, then all the individual assets of the company were also forfeitable, without any proof that each individual asset had been used in, or purchased by the proceeds of, a criminal enterprise. *Cauble*, 706 F.2d at 1349. *See also Tunnell*, 667 F.2d at 1188 (jury's special verdict need not identify which rooms of hotel were used in criminal enterprise for whole hotel to be forfeit); *Possick*, 849 F.2d at 341.

III.

Dodd raises two points of error on appeal. His contention that his conviction violated the Ex Post Facto clause lacks merit. We also affirm the trial court's denial of his motion to suppress evidence.

A. Ex Post Facto Claim

Dodd claims that his conviction for conspiracy beginning before the enactment of the Sentencing Guidelines violated the Ex Post Facto clause of the U.S. constitution, because his participation in the conspiracy "[was] not specifically shown to have continued past November 1, 1987." Dodd, however, does not argue here that he withdrew from the conspiracy by taking "affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach other conspirators." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 464-65 (1978); *see also United States v. Jimenez*, 622 E. 2d 753, 757 (5th Cir. 1980). There is no violation of the Ex Post Facto clause in the application of the Sentencing Guidelines to conspiracies that begin before the enactment of the Guidelines but continue after the Guidelines' enactment. *White*, 869 F.2d at 826.

B. Probable Cause for Search Warrant

Dodd also contends that the Drug Enforcement Agency's search of Dodd's property pursuant to a warrant violated the Fourth Amendment, because the warrant rested on stale evidence. We need not address probable cause for the warrant, because we find that the

Drug Enforcement Agency officers acted in good faith in relying on the issued warrant. *United States v. Leon*, 468 U.S. 897 (1984). *United States v. Craig*, 861 F.2d 818, 821 (5th Cir. 1988).

Where an officer's reliance on a warrant is objectively reasonable, evidence obtained under the warrant is not excluded. Such reliance is objectively reasonable unless the affidavit supporting the warrant is so lacking in indicia of probable cause as to render belief in its existence unreasonable. *Craig*, 861 F.2d at 821.

The record here shows a substantial basis for the conclusion that the officials acted in good faith in relying on the warrant. The warrant was issued on December 2, 1989, on the basis of an affidavit by DEA agent Lonnie Watson. Watson stated in the affidavit that he had been informed by Dodd's co-conspirator Payne that Dodd had supplied Payne with "multi-pound quantities" of amphetamine during 1986 and 1987. Watson also stated in his affidavit that Storey, another of Dodd's co-conspirators, had informed him that Storey and Dodd produced five pounds of amphetamine per week from March, 1987 until June of 1988, at Dodd's property. Storey also informed Watson that Dodd had constructed an underground cave on Dodd's property for producing amphetamine and that Dodd and Storey had discarded numerous pieces of broken laboratory glassware and chemical containers at a dumpsite on Dodd's property. Watson stated further in the affidavit that, as late as September 28, 1989, a narcotics officer informed Watson that he had searched a trailer registered to Dodd and had found drug manufacturing paraphernalia in the trailer.

Watson, an agent for the DEA of fourteen years' experience, stated that residue of amphetamine and precursor chemicals do not deteriorate even if buried or submerged in water over a period of years.

In short, there was evidence in the affidavit that Dodd's property had been continuously used for the production of amphetamine from March, 1988 until September 1989, four months before the warrant was issued. The affidavit indicated a long-standing pattern of illegal activity that produced physical remnants such as chemicals, broken glass, and an underground lab; these remnants were likely to persist even after the events described by Watson's informants had ended. These circumstances indicate that Watson's belief in the validity of the warrant was objective and reasonable, despite the gap in time between the occurrence of the events in the affidavit and the issuance of the warrant. *United States v. Webster*, 734 F.2d 1048, 1056 (5th Cir.), *cert. denied*, 496 U.S. 1073 (1984) (where information in affidavit alleges long-standing, ongoing criminal act, officer's reliance on warrant issued on basis of affidavit is good-faith reliance), *Craig*, 861 F.2d at 822 (where evidence sought under warrant is likely to persist, interval between facts described in affidavit and issuance of warrant is not fatal to finding of good faith reliance on warrant by officer). Resolving as we must all issues of credibility in favor of the government, *Glasser v. United States*, 315 U.S. 60 (1942), we find that there was a substantial basis in the record for the conclusion that the officers acted in good faith in relying on the warrant. We therefore affirm the trial court's rejection of Dodd's motion to suppress the fruits of the DEA officers' search.

IV.

Nichols raises two new points on appeal. First, he argues that there is insufficient evidence to support his conviction for conspiracy. We reject this argument. Second, Nichols argues that the trial court, in sentencing Nichols, erred in attributing to him possession of the entire amount of amphetamine distributed by the conspiracy. We hold that this contention has merit; we therefore vacate Nichols' sentence and remand his case to the trial court for re-sentencing.

A. Sufficiency of Evidence

Nichols argues that the trial court erred in rejecting his motion for a judgment of acquittal. Nichols did not renew his motion after introducing evidence in his defense. Nichols also rested and closed without renewing his motion after the government rested and closed. When a defendant does not renew a motion for acquittal at the conclusion of all the evidence, appellate review is limited to ascertaining whether there was a "manifest miscarriage of justice." Fed. R. Crim. P. 29(a); *United States v. Osgood*, 794 F.2d 1087, 1093 (5th Cir.), *cert. denied*, 479 U.S. 994 (1986). If a reasonable trier of fact could have found that Nichols conspired to distribute and produce amphetamines, then we must affirm the trial court's rejection of Nichols' motion for acquittal. *United States v. Freeze*, 707 F.2d 132, 135 (5th Cir. 1983).

We cannot say there was no reasonable basis for the jury's decision in this case. The government had to establish that Nichols knowingly and voluntarily joined in an agreement to commit a crime and that he committed an

overt act. *United States v. Ortiz-Loya*, 777 F.2d 973, 981 (5th Cir. 1985). Nichols does not dispute that Payne was the "hub" of a conspiracy. He argues that he did not knowingly join that conspiracy. At trial, however, there was testimony that Nichols usually purchased amphetamine from Ratheal whenever Ratheal purchased the drug from Payne. There was also testimony that Nichols re-sold the drug, that Nichols assisted the Ratheals in transporting the drug, and that Nichols knew that Payne was the Ratheals' supplier. This testimony, if believed, would be sufficient to establish that Nichols was a "link" in the distribution chain of the Payne conspiracy. From Nichols' knowledge that Payne was the Ratheals' supplier, a jury could infer that Nichols knew of the conspiracy. A jury could also infer from Nichols' purchase and resale of amphetamine that he voluntarily participated in and profited from the conspiracy to distribute amphetamine. *United States v. Gonzales*, 866 F.2d 781, 787 (5th Cir.), *cert. denied*, 490 U.S. 1093 (1989). We therefore affirm the trial court's rejection of Nichols' motion for acquittal.

B. Attribution of Quantity of Drugs under Sentencing Guidelines

Initially, Nichols' pre-sentence report stated that Nichols possessed two pounds of amphetamine with the intent to distribute. The government objected to the pre-sentence report, and an amended report was filed, crediting Nichols with possession of over 390 pounds of amphetamine, the entire amount of the drug attributed to the conspiracy. The trial court gave no reason for attributing to Nichols amphetamine possessed by other members

of the conspiracy other than the fact that Nichols was a co-conspirator.

The sentencing guideline pertaining to conspiracy, § 2D1.4, comment 1, allows conspirators to be sentenced "on the basis of the defendant's conduct or the conduct of co-conspirators in furtherance of the conspiracy *that was known to the defendant or was reasonably foreseeable.*" USSG, § 2D1.4 Comment (emphasis added). In order to attribute to a particular defendant amounts of a controlled substance that was the subject of a conspiracy, the sentencing court must determine the quantity of controlled substance that the defendant knew or should reasonably have foreseen the conspiracy would have involved.

The reasonable foreseeability required of § 2D1.4 requires a finding separate from a finding that the defendant was a conspirator. *United States v. Warters*, 885 F.2d 1266, 1273 (5th Cir. 1989). In *Warters*, this court vacated the sentence for misprision of conspiracy to traffic in marijuana for express findings of the amount of marijuana attributable to the defendant. *Warters*, 885 F.2d at 1272. This court noted that the entire amount of marijuana involved in the conspiracy was not automatically attributable to the defendant. Rather, the trial court would "need to expressly determine not only the actual amount involved in the entire conspiracy . . . but also the amount . . . which the defendant knew or should have known or foreseen was involved." *Id.* at 1273.

The district court here should have expressly found the quantity of amphetamine that Nichols ought reasonably to have foreseen was involved in the conspiracy. It does not necessarily follow from the fact that Nichols was

convicted of conspiracy that he could have reasonably foreseen the total quantity involved in the conspiracy: the acts of co-conspirators may be unforeseeable. See *Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946). Reasonable foreseeability is mentioned in the comment to § 2D1.4 as an addition to an act's being in furtherance of a conspiracy. The government's argument that reasonable foreseeability follows automatically from membership in a conspiracy leaves the second clause of the comment without meaning.

We express no opinion regarding the evidence of the quantity Nichols could have reasonably foreseen that the conspiracy would involve. We state only that proof of reasonable foreseeability does not follow automatically from proof that Nichols was a member of the conspiracy.

We AFFIRM in all respects except we VACATE Nichols' sentence. We REMAND Nichols' case only for additional fact finding and re-sentencing.

IN THE UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT

No. 90-1420

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RONALD JOSEPH PUMA, a/k/a Ronny Puma, DONNIE K. NICHOLS, a/k/a Dead Weight and DW, and ERNEST RAYMOND DODD, a/k/a RD,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Texas

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ON PETITIONS FOR REHEARING

(August 29, 1991)

Before REYNALDO G. GARZA, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing on behalf of appellants PUMA and DODD filed in the above entitled and numbered cause be and the same are hereby denied.

ENTERED FOR THE COURT:

/s/ Patrick E. Higginbotham
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

UNITED STATES OF AMERICA	*	CRIMINAL NO. 02-89-0029
V.	*	
RONALD JOSEPH PUMA, et.al.	*	

OBJECTIONS TO PRE-SENTENCE REPORT

Defendant, Ronald Joseph Puma ("Defendant"), submits the following objections to the pre-sentence report which has been filed in this case:

Objections to Part A

1. Defendant objects to paragraph 5, wherein it implies that the Defendant has been involved in a "large scale criminal enterprise" since April, 1986, and that he had been a "main figure" throughout this period.

2. Defendant objects to paragraph 6, wherein it suggests that the Defendant was a so-called "top-level executive" for the whole period beginning in April, 1986. Defendant specifically objects to the statement therein which says, "These three individuals also were fully cognizant of the extent and nature of the conspiracy.", as a conclusion which far exceeds any relevant evidence presented at trial and is contradicted by the officer's statement in paragraph 4 of the report. This further is an improper and

incorrect application of the sentencing guidelines and criteria.

3. Defendant objects to paragraphs 7-10 since the information contained therein has no applicability to Defendant, since no references are made to Defendant, and is inappropriate for the purposes for which the sentencing guidelines were established. Further, statements contained in the latter portion of paragraph 10, specifically, "this search lent support to the information about the conspiracy which had been provided by various sources of information over several years.", are vague and open-ended conclusions which appear to be a strained attempt to implicate the Defendant in the actions of Mr. Payne and others, and is an improper and inappropriate application of the sentencing guidelines and criteria.

4. Defendant objects to paragraph 11, for the same reasons as given above, and that it contains matters that are immaterial for the purposes of sentencing.

5. Defendant objects to paragraph 12, since it includes primarily information pertaining to the activity of persons other than the Defendant, and exceed the permissible application of the sentencing guidelines.

6. Defendant objects to paragraph 13, for the same reasons as set out above.

7. Defendant objects to paragraphs 15, 16, and 17, as no counts against Defendant involve the assertions made therein, and is an impermissible exercise of the sentencing procedure and guidelines.

8. Defendant objects to paragraph 18, because it makes an improper and incorrect application of the sentencing

guidelines and adjustment rules, specifically as to rule 3C1.1.

9. Defendant contends that a reduction of sentence under Section 3E1.1 of the guidelines is mandated. Defendant's exercise of his constitutional right to trial should not be used to penalize him in a manner in conflict with the sentencing guidelines and due process of law..

10. Defendant objects to the adjustment for role in the offense, set out in paragraph 22, since it contains an improper and incorrect application of the sentence guidelines and adjustments.

11. Defendant objects to the offense level computations contained in paragraphs 20 and 21 as an improper and incorrect application of the sentencing guidelines and adjustments.

12. Defendant objects to the adjustment for obstruction of justice contained in paragraph 24, for the reasons contained in #10 and #11 above.

13. Defendant objects to the adjustment for obstruction of justice contained in paragraph 26, for the reasons contained in #10 and #11 above.

Objections to Part C

14. Defendant objects to the offense level classification in paragraph 34.

15. Defendant contends that the probation officer failed to take into consideration his family situation and those who are dependent on him. Further, insufficient consideration was given to the utter lack of any criminal history

relating to Defendant's past. Further, the factual assertions made in the report have been contradicted by the testimony of the Defendant and other witnesses. Unless specifically agreed to, Defendant objects to the matters contained in the pre-sentence report.

Conclusion

Defendant contends the pre-sentence report fails to properly apply the guidelines and does so in a manner in violation of the law.

Respectfully submitted,

GEORGE C. THOMPSON, JR.
& ASSOCIATES, INC.
1209 E. BELKNAP
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(817) 335-2301

ORIGINAL SIGNED BY
GEORGE C. THOMPSON, JR.
GEORGE C. THOMPSON, JR.
ATTORNEY AT LAW
STATE BAR NO. 19954000

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was forwarded to Michael L. Roberts, U.S. Probation Officer, 205 E. 5th F13247,

Amarillo, Texas 79101, by mail this ___ day of _____, 1990.

ORIGINAL SIGNED BY
GEORGE C. THOMPSON, JR.
GEORGE C. THOMPSON, JR.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was forwarded to Mr. James A. Farren, Assistant U. S. Attorney, Federal Courthouse, 205 E. 5th Street, Amarillo, Texas 79101, by mail this ___ day of _____, 1990.

ORIGINAL SIGNED BY
GEORGE C. THOMPSON, JR.
GEORGE C. THOMPSON, JR.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

UNITED STATES OF AMERICA	*	
	*	
V.	*	CR 02-89-0029
	*	
RONALD JOSEPH PUMA	*	

GOVERNMENT'S RESPONSE TO OBJECTIONS OF DEFENDANT PUMA TO PRESENTENCE REPORT

TO THE HONORABLE COURT:

The United States submits the following response to the objections of defendant RONALD JOSEPH PUMA to the presentence report prepared in this case:

1. The Probation Officer's factual conclusions in paragraph 5 of the report are amply supported by the evidence. The testimony at trial overwhelmingly established that the amphetamine conspiracy of which Puma was a member was a "large scale criminal enterprise," that Puma was a "main figure," and that the conspiracy existed from at least April of 1986. Robert and Mary Sue Payne testified that they turned to Puma as their exclusive source of supply of amphetamine oil in February or March of 1988, but that they had learned that Puma had already been supplying Ernest Raymond Dodd with oil for some period of time before that. In addition, Dennis Storey testified that on at least two occasions, once in October of 1986 and again in early 1987, he powdered some amphetamine oil for Dodd that Puma had supplied. Storey also testified that during the football season of

1986 he and Puma discussed that they were both in the amphetamine business and needed a legitimate business to "front" their income.

2. For the same reasons discussed in paragraph 1 above, the factual conclusions in paragraph 6 of the report concerning Puma's status as a "top level executive" of the conspiracy are also correct. Indeed, the jury obviously believed this testimony, because it convicted Puma of running a continuing criminal enterprise. Puma's objection to the statement that "These three individuals also were fully cognizant of the extent and nature of the conspiracy" is baseless. That statement obviously refers to Mary Sue Payne, Linda Sloan, and Danny Williams, not to Puma.

3. Puma does not appear to contest the accuracy of the background facts set forth in paragraphs 7 through 10 of the report or even of the specific portions of paragraph 10 to which he objects. He objects only that these facts do not apply to him. In fact, the trial testimony fully supports these conclusions. There is no need for any "strained attempt to implicate" Puma in Payne's activities, as Puma alleges. The testimony of the government's witnesses established Puma's complicity beyond any reasonable doubt.

4. See paragraph 3 above.

5. See paragraph 3 above.

6. See paragraph 3 above.

7. See paragraph 3 above.

8. Puma does not say in what way he contends § 3C1.1 has been incorrectly applied. In fact, the report

has properly increased Puma's offense level by two levels due to his wilful obstruction of justice and attempt to impede these proceedings. The factual statements in the report concerning Puma's activity are supported by the testimony of Mary Bollinger and Robert Payne, both of whom were witnesses to Puma's threats to eliminate witnesses against him.

9. Puma is absolutely not entitled to any reduction in his offense level under § 3E1.1 because of his supposed acceptance of responsibility. Throughout the trial, and apparently even in his post-conviction statements to the Probation Officer, Puma has steadfastly denied any guilt. Moreover, his contention that he has been improperly penalized for electing to go to trial is without merit. *United States v. Kane*, 887 F.2d 568, 574 (5th Cir. 1989); *United States v. White*, 869 F.2d 822, 826 (5th Cir.) *cert. denied*, ___ U.S. ___, 109 S. Ct. 3172 (1989).

10. Again, Puma does not say in what way the report incorrectly adjusted his offense level based on his role in the offenses of conviction. The facts presented at trial amply support the conclusion that he was a leader of criminal activity that involved five or more participants, as the jury obviously found when it convicted him of running a continuing criminal enterprise. Section 3B1.1(a) provides for increasing the offense level by four levels on that basis.

11. Puma again makes the conclusory allegation that the report incorrectly applies the sentencing guidelines but does not say what was improper or incorrect. In fact, the Probation Officer has correctly applied §§ 2D1.1, 2D1.4, 3D1.2, and 3D1.3.

12. See paragraph 8 above.

13. Paragraph 26 of the report refers to the potential downward adjustment – denied to Puma – for acceptance of responsibility, not to the upward adjustment for obstruction of justice. See paragraph 9 above concerning acceptance of responsibility and paragraph 8 above concerning obstruction of justice.

14. Puma has failed to articulate any specific objection to what he calls the "offense level classification" in paragraph 34 of the report. In fact, there is no reference to offense level in paragraph 34, only a statement concerning the statutory provisions for supervised release. If Puma intended to refer to the offense level calculated in paragraph 33, the United States responds that the Probation Officer has calculated the offense level in complete accord with the applicable sentencing guidelines. As discussed in the preceding paragraphs, Puma's few challenges to the factual conclusions on which the calculation is based are as baseless as his unspecific claims of improper application of the guideline criteria.

15. The report has set forth in great detail Puma's version of his family background and has duly noted his lack of previous criminal convictions. Moreover, Puma's sweeping assertion that he objects to apparently *all* matters contained in the report – he does not specifically agree to any statement – is improper under Fed. R. Crim. P. 32(c) and should not be considered by the Court.

Conclusion

Defendant Puma has pointed to only two alleged factual inaccuracies in the presentence report, both of which are fully supported by the trial testimony. His vague claims of improper application of the guidelines are without foundation and should be rejected. The presentence report is complete and accurate as it stands.

Respectfully submitted,

MARVIN COLLINS
United States Attorney

/s/ Sharon R. Kimball
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(806) 376-2356

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by placing the same in the United States mail on this 8th day of May, 1990, addressed to George Thompson, 1209 E. Belknap, Fort Worth, Texas 76102.

/s/ Sharon R. Kimball
SHARON R. KIMBALL
ASSISTANT UNITED STATES
ATTORNEY